

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS,

Plaintiff,

VS.

UNITED STATES FEDERAL EMERGENCY
MANAGEMENT AGENCY,

Defendant.

No. CIV _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Preliminary Statement

1 This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. §552 et seq., to
compel the U.S. Federal Emergency Management Agency (“FEMA”), an agency of the U.S.
Department of Homeland Security, to produce documents and records regarding the National Flood
Insurance Program, including documents relating to FEMA’s compliance – or lack thereof – with the
Settlement Agreement and Stipulation of Dismissal in Forest Guardians v. Federal Emergency
Management Agency, Civil No. 01-0079-MCA/RLP.¹

2 Plaintiff WildEarth Guardians is a New Mexico not-for-profit corporation devoted to research and public education concerning the management of public lands and resources, including the protection of watersheds and the recovery of threatened and endangered species.

¹ Plaintiff WildEarth Guardians was formerly known as Forest Guardians.

3 WildEarth Guardians requested the documents and records that are the subject of this lawsuit in
furtherance of its objective of assuring that the public is informed regarding the environmental impacts of
federal government programs and activities. WildEarth Guardians requested the subject documents
and records in four separate requests submitted to FEMA between August of 2007 and February of
2008.

4 As detailed below, FEMA has never made a substantive response to any of the four FOIA
requests that seek the documents and records that are the subject of this lawsuit.

5 FEMA's failure to provide substantive responses to WildEarth Guardians' four FOIA requests
for documents and records constitutes a violation of the FOIA, and further constitutes constructive
exhaustion of WildEarth Guardians' right to administratively appeal FEMA's violation of the mandatory
requirements of FOIA. 5 U.S.C. §552(a)(6)(C)(i).

6 In this civil action, WildEarth Guardians seeks a court order declaring that FEMA's failure to
respond to WildEarth Guardians' requests for documents and records violates the FOIA and ordering
FEMA to produce the requested documents and records. 5 U.S.C. §552(a)(4)(B).

II. Jurisdiction and Venue

7 This Court has jurisdiction over this action under 5 U.S.C. §522(a)(4)(B) (FOIA), 28 U.S.C.
§1331 (federal question), and 28 U.S.C. §1361 (mandamus).

8 Venue in this Court is proper under 5 U.S.C. §522(a)(4)(B) (FOIA), because Plaintiff
WildEarth Guardians is a New Mexico not-for-profit corporation with its principal place of business in
New Mexico.

III. Parties

9 WildEarth Guardians is a non-profit conservation organization with its primary place of business in Santa Fe, New Mexico. WildEarth Guardians has approximately 4,500 members throughout the United States. WildEarth Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the United States, and to safeguarding habitats relied upon by threatened and endangered species. In part, WildEarth Guardians works in furtherance of its goals by acquiring information regarding federal programs and activities through the federal Freedom of Information Act. WildEarth Guardians then compiles and analyzes that information and, subsequently, disseminates that information to its membership, the general public, and public officials through publications, reports, its website and newsletter, general news media coverage, and public presentations. WildEarth Guardians' successful efforts at educating the public on issues concerning federal government program and activities that affect the environment contribute significantly to the public's understanding of governmental operations and activities. WildEarth Guardians also uses the information that it acquires through FOIA to participate in federal decision making processes, to file administrative appeals and civil actions, and generally to ensure that federal agencies comply with federal environmental laws. WildEarth Guardians and its members are directly injured by FEMA's failure to comply with the statutory requirements of FOIA and a favorable outcome of this litigation will redress that injury. WildEarth Guardians bring this action on behalf of itself, its staff, and its members.

10 Defendant FEMA is a federal agency which administers the National Flood Insurance Program pursuant to the National Flood Insurance Act of 1968. 42 U.S.C. §4001 et seq. FEMA has a

mandatory statutory duty to respond to FOIA requests that are made to the agency, and is sued in this action in connection with its statutory duties under the FOIA.

IV. Facts

11 Except in circumstances that are not relevant in this case, the FOIA requires federal agencies to “determine within 20 days . . . after the receipt of any [FOIA] request whether to comply with such request and . . . immediately notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. §552(a)(6)(A)(i).

12 Pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. §4001 et seq., FEMA administers the National Flood Insurance Program. In connection with its administration of the National Flood Insurance Program, FEMA maps floodplains, develops minimum floodplain management criteria which guide floodplain development, and administers a community ratings system.

13 WildEarth Guardians has an on-going concern that FEMA’s implementation of the National Flood Insurance Program might adversely affect wildlife species that are listed as threatened and endangered under the Endangered Species Act, 16 U.S.C. §1531 et seq., as well as the habitat that these species rely on for their continued survival.

14 To address this concern, WildEarth Guardians filed a lawsuit against FEMA in 2001 in which it sought a court order requiring FEMA to consult with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §1536(a)(2), as to the nature and extent of the effects of the National Flood Insurance Program on threatened and endangered species in New Mexico. See Forest Guardians v. Federal Emergency Management Agency, Civil No. 01-0079-MCA/RLP.

15 The Forest Guardians lawsuit was resolved by a Settlement Agreement and Stipulation of Dismissal that was filed with the Court on February 25, 2002.

16 Upon a joint motion of the parties, the terms of the parties' February 25, 2002 Settlement Agreement and Stipulation of Dismissal were incorporated into an Order of this Court which was filed on April 25, 2002.

17 For purposes of ascertaining FEMA's compliance with the terms of the Settlement Agreement, and to otherwise obtain information on the nature of the National Flood Insurance Program and its associated environmental impacts, WildEarth Guardians submitted four FOIA requests to FEMA. Each of these requests is described below.

First Request – August 18, 2007 FOIA Request

18 On August 18, 2007, WildEarth Guardians (under its former name, Forest Guardians) submitted a FOIA request to FEMA seeking six categories of documents relating to FEMA's compliance with the parties' Settlement Agreement and Stipulation of Dismissal in the Forest Guardians case.

19 FEMA never responded to the August 18, 2007 FOIA request.

Second Request – February 13, 2009 FOIA Request

20 On February 13, 2009, WildEarth Guardians submitted a FOIA request to FEMA in which it sought the same documents that it had earlier requested in its FOIA request of August 18, 2007, as well as other documents relating to FEMA's administration of the National Flood Insurance Program in New Mexico.

21 FEMA received this FOIA request on February 19, 2009.

22 In response to this FOIA request, FEMA wrote WildEarth Guardians an undated letter in which it informed WildEarth Guardians that the request had been assigned tracking number 09-284. The FEMA letter also represented that FEMA “will respond to your request as expeditiously as possible.”

23 In its letter to WildEarth Guardians assigning a tracking number to the FOIA request, FEMA did not request any further information from WildEarth Guardians that would toll the twenty day period for a substantive response to the FOIA request.

24 In its letter to WildEarth Guardians assigning a tracking number to the FOIA request, FEMA did not represent that there were any unusual or exceptional circumstances that would justify a failure to comply with the twenty day response deadline under the FOIA.

25 Since FEMA sent its letter assigning a tracking number to the FOIA request, FEMA has not provided any further response to the FOIA request.

Third Request – February 13, 2009 FOIA Request

26 Also on February 13, 2009, WildEarth Guardians submitted a FOIA request to FEMA in which it sought documents and records relating to FEMA’s floodplain mapping and the location of structures insured under the National Flood Insurance Program.

27 FEMA has never provided any response to this FOIA request.

Fourth Request – February 13, 2009 FOIA Request

28 Also on February 13, 2009, WildEarth Guardians submitted a FOIA request to FEMA in which it sought three categories of documents and records pertaining to FEMA’s efforts to comply with

the Endangered Species Act in connection with its administration of the National Flood Insurance Program.

29 In a letter of April 14, 2009, FEMA claimed that it received the February 13, 2009 FOIA request on March 12, 2009 and informed WildEarth Guardians that the FOIA request was assigned tracking number 09-361. The FEMA letter also represented that FEMA “will respond to your request as expeditiously as possible.”

30 In its letter to WildEarth Guardians assigning a tracking number to the FOIA request, FEMA did not request any further information from WildEarth Guardians that would toll the twenty day period for a substantive response to the FOIA request.

31 In its letter to WildEarth Guardians assigning a tracking number to the FOIA request, FEMA did not represent that there were any unusual or exceptional circumstances that would justify a failure to comply with the twenty day response deadline under the FOIA.

32 Since FEMA sent its letter assigning a tracking number to the FOIA request, FEMA has not provided any further response to the FOIA request.

33 FEMA’s failure to produce the documents and records requested by WildEarth Guardians in the four FOIA requests identified in this complaint within the mandatory twenty day period established by FOIA has frustrated and continues to frustrate WildEarth Guardians’ pursuit of its objective to educate its members, the public, and decision makers as to the environmental effects of federal government programs and activities.

V. Cause of Action

34 WildEarth Guardians incorporates the preceding paragraphs by reference as if fully set out herein.

35 FEMA has violated FOIA by failing to respond to WildEarth Guardians' request for documents and records within twenty days of receipt.

36 FEMA continues to violate FOIA by failing to respond to WildEarth Guardians request for documents and records.

VI. Request for Relief

WHEREFORE, WildEarth Guardians request that this Court:

37 Declare unlawful FEMA's failure to respond to WildEarth Guardians' requests for documents and records within twenty days of receipt. 5 U.S.C. §552(a)(4)(B).

38 Order FEMA to produce immediately the documents and records requested by WildEarth Guardians. 5 U.S.C. §552(a)(4)(B).

39 Declare that FEMA has a mandatory obligation under the FOIA to respond to requests for documents and records within the time prescribed by the FOIA.

40 Award WildEarth Guardians its reasonable attorney fees and costs incurred in prosecuting this civil action. 5 U.S.C. §552(a)(4)(E).

41 Declare that the circumstances surrounding FEMA's failure to respond to WildEarth Guardians' requests for documents and records raises questions whether FEMA personnel acted arbitrarily and capriciously. 5 U.S.C. §552(a)(4)(F).

42 Grant such other and further relief as the Court deems just and proper.

Dated: May 20, 2009

Respectfully submitted,

/s/ Steven Sugarman
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